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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

MEMPHIS TRANSIT COMPANY,
Petitioner,

vs.

STATE OF TENNESSEE, ex rel
W. M. LEECH, Commissioner of Highways and Public Works,
Respondent.

No. 862

(Tennessee Supreme Court Record captioned State of Tennessee, ex rel vs. Southern Bell Telephone and Telegraph Company, et al with Memphis Transit Company an Intervenor.)

REPLY BRIEF TO BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

While the Petitioner believes that sufficient basis for the granting of the Writ of Certiorari is set out in its Petition, we feel it would be helpful to the Court if we filed a Reply to the Brief in Opposition to the Petition for Certiorari filed by the State of Tennessee through Messrs. James M. Glasgow and Jack Wilson, Assistant

Attorneys General. Accordingly we shall take up the points in the order in which they appear in the Brief in Opposition to the Petition for Certiorari.

At the bottom of page 2 and the top of page 3 the State again raises the principal allegations in the original bill which were issues in the State Court. The basis for the State Supreme Court decision that Chapter 170 of the Tennessee Public Acts of 1957 violates the Tennessee Constitutional provision prohibiting the lending of the State's credit is fully dealt with in this petitioner's Petition for Writ of Certiorari, wherein it was shown that the state courts of 7 of the 9 states which have passed on reimbursement acts similar to Chapter 170 of the Public Acts of 1957, and all of which have State Constitutional provisions prohibiting the lending of State's credit, have upheld these reimbursement statutes, all of which are based upon the 1956 Federal Highway Act. This was the only question decided by the Tennessee Supreme Court from the issues alleged in the State's original bill and that decision by a 3 to 2 split decision with the Chief Justice dissenting. The second point raised by the respondent is that the reimbursement act violates Article XI, Section 8 of the Constitution of Tennessee, which prohibits unreasonable legislative classifications, laws favoring individuals and laws granting rights, immunities, privileges, or exemptions.

It is well established that there is a presumption that a classification made by the legislature is reasonable, and "if any possible reason can be conceived to justify the classification • • • it will be upheld and deemed reasonable," and one who assails the classification must carry the burden of showing it is essentially arbitrary.

McDonnell vs. Knoxville
172 Tenn. 190
110 S. W. 2d. 478, 479

Scott vs. Nashville Bridge Co.
143 Tenn. 86
223 S. W. 844

Motlow vs. State
125 Tenn. 547
145 S. W. 177

Ogilvie vs. Hailey
141 Tenn. 392
210 S. W. 645

It is also well settled that "the equal protection clause does not require that the State laws shall cover the entire field of proper legislation in a single enactment."

Middleton vs. Texas Power & Light
249 U. S. 152, 157

Williamson vs. Lee Optical Co.
348 U. S. 483, 489

A somewhat similar classification is found in

Sun Coal Company vs. State
157 Tenn. 522
11 S. W. 2d 893,

which involved a statute enacted under the police power requiring operators of coal mines employing *more than 50 persons* to provide showers, etc. The statute was attacked on the ground that it was an invalid classification in violation of Arti[illegible] Section 8 of the Tennessee

Constitution. This case affirms the doctrine that if any state of facts can be reasonably conceived which would sustain the act, the act must be upheld and said "• • • even though the health of the employees in a smaller mine should be accorded the same protection, the expense of compliance with the statute may have been regarded by the legislature as too great a burden to be required of the smaller mine; and *this consideration would furnish a reasonable basis for classification.* • • •" (emphasis supplied.) By analogy the classifications in Chapter 170 of the Tennessee Public Acts of 1957 dealt with utilities where there would be a result of undue hardship on the utility to the extent that its financial structure would be impaired, or its rates subjected to an increase as a result of said relocation costs.

The third question raised at the top of page 3 was that the act in question violated Article 1, Section 17 of the Tennessee Constitution which prohibits suits against the state. The state has never seriously made this contention, and this constitutional prohibition does not apply where the state consents to such suit by legislative enactment. For example there is a statutory Board of Claims established by statute in Tennessee which hears tort and other claims against the state which Board is so well recognized by the Attorney General's office that they have a special assistant assigned to do nothing but handle board of claims cases.

In fact, the last sentence of Article I, Section 17, of the Tennessee Constitution states:

> "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."

The fourth contention is that the statute in question violates Article 1, Section 20 of the Constitution of Tennessee, which prevents the impairment of contracts. There was a contract alleged between the State and Southern Bell Telephone & Telegraph Company in this case, the validity of which it is unnecessary to discuss here, as there has never been any contention that there was any contract requiring the Memphis Transit Company to remove its facilities at its own expense. On the contrary, the Intervening Petition of this Petitioner in the Court of original jurisdiction shows that it paid substantial considerations for its franchise and property rights therein.

The last point raised by the State was that the Act (Chapter 170 of the Public Acts of 1957) is void for indefiniteness. Our original petition points out that there are nine states in which the State Courts have passed upon acts almost identical to Chapter 170 of the Public Acts of 1957, which states have almost identical State Constitutional provisions prohibiting the lending of credit, and all of which reimbursement acts are based upon the 1956 Federal Highway Act as amended. The fact that seven of these nine states have upheld these acts should be authority enough to refute this proposition without going further into the authorities dealing with statutory construction.

While the State apparently does not seriously contend these propositions and has cited no authority on the last four propositions, we thought they should be dealt with briefly.

At page 4 of the opposition brief they quote from the

majority opinion of the Tennessee Supreme Court to the effect that the primary purpose served by the expenditure is for the convenience and benefit of the utility and the purpose cannot be public. Chief Justice Neal and Justice Tomlinson, two of the five justices of the Tennessee Supreme Court, held to the contrary, as well as seven of the nine State Courts that have passed upon this question. A splendid discussion refuting this argument, supported by Tennessee authorities, is found in that portion of Chief Justice Neal's opinion appearing at pages 54 through 58 of our petition.

At page 5 of the opposition brief it is argued that there could not be any issue as to the repugnancy of the state statute to the Federal Constitution. This argument completely misses the point. The point is that the *effect* of the State Supreme Court's holding, that the state statute violates the state constitutional provision prohibiting the lending of credit, is repugnant to the Federal Constitution and in violation of the fifth and fourteenth amendments to the United States Constitution.

The State further argues that we have no "rights" and that we are mere permissive users on the state's rights of way. This is clearly an erroneous argument. To begin with, our intervening petition sets forth very valuable considerations paid by this petitioner to the City of Memphis under authority of the appropriate Tennessee Statutes for its franchise rights in the City of Memphis. Even without these payments the fact that a utility's right of occupancy is a vested right under the Federal Constitution was decided in Russell vs. Sebastian, 233 U. S. 195, 58 Law Edition 912 (and many other

cases therein cited.) In Russell vs. Sebastian this Court said:

> "That the grant, resulting from an acceptance of the state's offer, constitutes a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this Court."

This is a well established principle in this Court as well as in Tennessee. The principle was established in Tennessee in

> *City of Chattanooga vs. Tennessee Electric Power Co.*
> 172 Tenn. 524,
> 112 S. W. 2d 385,

in which the Court said:

> ". . . a right-of-way upon a public street, whether granted by act of the legislature or ordinance of city council or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale and mortgage, and entitled to all of the constitutional protection afforded other property rights and contracts . . ."

This case further recognizes that the rule is adhered to by the United States Supreme Court.

The opposition brief cites a number of cases which they state hold that the judgment of the highest court of the state as to the meaning and effect of its own constitution and statutes is controlling. It is conceded that this is the general rule, but *it does not apply in cases of arbi-*

trary exercise of the police power where the effect of the decision contravenes the United States Constitution.

The case of

McCoy vs. Shaw
277 U.S. 302,
48 S. Ct. 519,
72 L. Ed. 891,

cited on page 7 of the opposition brief, recognizes exceptions where the decision is arbitrary or is a device to prevent a review upon the Federal question.

In the case of

N. C. & St. L. Railway vs. Walters
294 U.S. 405,
79 L. Ed. 949,

this Court said, at page 955 of 79 Law Edition, in part:

> "The police power is subject to the constitutional limitation that it may not be exerted arbitrarily and unreasonably."

In that case the state was attempting to impose upon the railroad one-half of the cost of the underpass in question in 1935. As in the present case, the railroad in the *Walters* case got no benefit from the underpass except that which was common to the entire United States taxpaying public. The Court talked about the impact of the great Federal highway program of that day, which was a mere drop in a bucket compared to the impact of the unprecedented highway program contemplated by the Federal Highway Act of 1956 as amended. The Court

held that imposition of 50% of these costs on the railroad would be an arbitrary and unreasonable exercise of the police power.

In the present case, the State is attempting to impose upon this petitioner 100% of these costs, and if imposition of 50% of the costs in the *Walters* case justified a holding that it was an arbitrary exercise of the police power, certainly our contention that the effect of the decision of the majority of the Tennessee Supreme Court (split decision 3-2) is an arbitrary exercise of the police power upon this petitioner, is warranted.

In the *Walters* case, as in the present case, the utility was contending that the effect of the holding was in violation of the Fourteenth Amendment to the United States Constitution.

The majority opinion of the Tennessee Court on rehearing ignored the Federal constitutional question set forth in this Petitioner's Intervening Petition in the Court of original jurisdiction and two Petitions to Rehear and thereby evaded it.

The opposition raises the question:

> "Can this court require a State Court to construe a state statute as being constitutional and a valid state law when the state's highest judicial tribunal finds and declares that the state statute is contrary and repugnant to the State Constitution?"

It is our earnest insistence that under the *Walters* case, cited in our Petition for Writ of Certiorari, and cases cited therein, the highest court of the state has no right

to hold a state statute unconstitutional under the state Constitution if the *effect* of that holding amounts to an arbitrary exercise of the police power in violation of the Federal Constitution. The opposition brief raises the question that if this first question can be determined in the affirmative, could this Court determine as a matter of fact that the petitioner's properties will be confiscated under the Fifth and Fourteenth Amendments when a justiciable controversy was not alleged in an action for declaratory judgment in a state court as between the petitioner and respondent? Petitioner in its Petition for Certiorari sets out the allegations in the Intervening Petition in the court of original jurisdiction and the substance of the two Petitions to Rehear setting forth the fact that the capital structure of this petitioner will not permit payment of these relocation costs, the fact that the probable result will inevitably be bankruptcy or receivership, and that the effect will be a taking of this petitioner's property without due process of law. These wholesale takings of this petitioner's property are brought about by the tremendous costs involved by a vast new concept of multilane high-speed trafficways, which require rights-of-way of spectacular width, cloverleafs, overpasses, underpasses and long distances thereof through urban areas, contributing to the tremendous cost of the National System of Interstate and Defense highways. The real causative factor is the 1956 Federal Highway Act as amended. This Act is no ethereal dream, it is an actual reality and an Act before this Court.

The opposition brief subsequently argues that before there could be confiscation, there must be an actual taking of the property right. Learned counsel in opposition have apparently forgotten that it was they who

filed the "Original Bill for a Declaratory Judgment" in the Chancery Court of Davidson County, Tennessee, the court of original equity jurisdiction in our state. The suit was filed in the name of the Highway Commissioner by them on relation of the State of Tennessee *to seek a declaration of the rights of the parties.* It was they, who in the prayer to their original bill among other things prayed:

> "2. That Chapter 170 of the Public Acts of 1957 be declared unconstitutional and for nothing held and that the Court declare and fix the rights of the parties under the Constitution, the statutes . . . and
>
> 3. That the complainant have general relief."

Like the *Walters* case, this suit was begun in the same Tennessee equity court of original jurisdiction for a declaratory judgment. Although the suit was originally instituted against Southern Bell Telephone and Telegraph Company, by order of the Chancery Court this Petitioner was allowed to intervene and file an Intervening Petition. There is no reason for this petitioner to sit and wait until it is doomed by the actual taking of the property and if such were done, no doubt learned opposition counsel would raise the point that we should have raised the point we are raising in this litigation. On this proposition, we cite 19 *American Jurisprudence,* under the subject of *Equity,* Section 127, which is in part as follows:

> "127. *Retention of Jurisdiction; Disposal of Litigation.*—The rule is that equity will not enter a partial or incomplete decree. Having taken cognizance of a cause for any purpose, a court of equity will ordinarily retain jurisdiction for all purposes; de-

cide all issues which are involved by the subject matter of the dispute between the litigants; award relief which is complete and finally disposes of the litigation so as to make performance of the court's decree perfectly safe to those who may be compelled to obey it; accomplish full justice between the parties litigant; and prevent future litigation. All persons who are interested in the subject matter of dispute will be brought before the court in order that there may be entered and enforced a complete and effective decree which will finally adjust the rights of all concerned. A part of the controversy should not be remitted to a court of law. . . .". (Emphasis supplied)

A court of equity ought to do justice completely and not by halves.

Greene vs. Louisville & I. R. Railroad Co.
244 U. S. 499,
61 Law Ed. 1280,
37 S. Ct. 673

McGowan vs. Parish
237 U. S. 285,
59 Law Ed. 955,
35 S. Ct. 543

Camp vs. Boyd
229 U. S. 530,
57 Law Ed. 1317,
33 S. Ct. 785

The record (Petitioner's Intervening Petition and two Petitions to Rehear) clearly shows that the effect of this decision will amount to a wholesale taking of this petitioner's property. The 1956 Federal Highway Act as amended is before this Court and its terrific impact is manifest and obvious from the Act itself.

On pages 10 and 11 of the opposition brief, they go into the alleged contract between the State and Southern Bell Telephone and Telegraph Company. This is an irrelevant argument for the very good reason that nowhere in the record is it contended that there was any contract in existence between this Petitioner and the State.

On page 12 of the opposition brief, it is argued that they estimate the cost of removing these utility facilities as being $15,370,000.00, being more than one-half of the amount the General Assembly of 1957 authorized the State to borrow for highway purposes under Chapter 264 of the Public Acts of 1957. The fallacy in this argument is that the appropriation under Chapter 264 of the Public Acts of 1957 was for a biennium, and the Federal Highway Program is planned to extend over a thirteen to fifteen year period. Furthermore on any Interstate Defense Highway the State will only be paying ten per cent of the cost of relocation and the Federal Government the remaining ninety per cent.

In discussing *Nashville, Chattanooga & St. Louis Railway v. Walters* on page 14 of the opposition brief it is conceded:

> "The Nashville case is authority for the proposition that a State cannot arbitrarily require a railroad to bear fifty per cent of the cost of eliminating a grade crossing under a State statute."

This concession by implication admits that the State cannot arbitrarily require this Petitioner to bear one hundred per cent of the cost of removing its facilities as a result of impact of the unprecedented Federal High-

way program. If this Honorable Court would think the action in the Walters case was arbitrary, certainly there should be no question but that the effect of the present decision is unreasonable and arbitrary action.

The General Common Law Rule requiring utilities to move their facilities for road improvement at their expense grew out of horse and buggy days, when travel was largely local and the costs were ultimately paid by local people in increased utility rates. As pointed out in our Petition for Writ of Certiorari, Congress recognized this in their Congressional hearings.

In addition to the tremendous amount of Interstate travel today, these Interstate Highways are built for National Defense as well. Congress, therefore, recognized that it was inequitable to force the tremendous relocation cost involved upon local ratepayers who receive no advantage, which is not common to the entire United States tax paying public.

The State relies heavily upon

Erie Railroad Co. v. Public Utilities Commissioners 254 U. S. 394; 41 Supreme Court 169,

and it might be noted that Counsel for the State of Tennessee relied upon this same case in the Walters case, and that this Court distinguished the Erie Railroad Company case from the Walters case, as should be done in this case. The Erie case was decided January 3, 1921, and simply reiterated the old Common Law Rule at a time long before the terrific impact of the present Federal Highway Program was felt.

The State also relies upon

Atchinson T. & S. F. Railway Co. v. Public Utilities Commission (1953 Calif.) 346 U. S. 346; 74 Supreme Court 92. This was a case which again largely involved a local transportation problem, and the case cites the *Walters* case with approval. The main cost of this petitioner, as shown by the record, comes from the clover leaves, changes in grade and other problems attached to relocations necessitated by the Interstate Defense System under the 1956 Federal Highway Act.

The State also relies upon

State of Tenn. v. United States, et al (6th Circuit 1958), 256 Fed. (2d) 244, 258. This case involved the alleged contract between the State of Tennessee and Southern Bell Telephone and Telegraph Company, and an entirely different set of facts from those presented under the reimbursement statute.

On page 17 the opposition brief states:

> "However, the claims asserted do not affect State-Federal relationships, and are not shown to be of such public importance as to affect generally the citizens of the United States."

We are at a loss to see how our opponents can claim that there is no State-Federal relationship, when the whole basis for the State Act in question was the 1956 Federal Highway Act, and its sole purpose was to enable the State to pay enough to the utilities to qualify for reimbursement under the Federal Act.

We further respectfully submit that this principle involves every utility user or rider in the United States, and that it, therefore, affects over ninety per cent of the citizens of the United States. It is hard for us to conceive of a question that would affect more pocket books.

CONCLUSION.

In conclusion this petitioner respectfully urges that the effect of the Tennessee Supreme Court's decision will amount to a wholesale taking of this petitioner's property, without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, and will literally bankrupt many of the small and sick utilities. The broad principles involve over ninety per cent of the citizens of the United States (all utility riders and users of any type), and the gross inequity of having citizens in some states paying for these relocation costs in utility bills, and again paying in Federal taxes for ninety per cent of the relocation costs in other states where similar acts are upheld.

It is respectfully urged that a situation where local rate payers paid for relocation cost for improvement of roads almost entirely for local benefit, which was the reason underlying the old Common Law General Rule, no longer exists, and that the tremendous new concepts of Interstate Defense Highway building under the 1956 Federal Act must be recognized, and that if so, progress demands modification of the Common Law Rule, and demands protection for the utilities against an arbitrary and unreasonable exercise of the police power. When a State Legislature attempts to modify the Common Law Rule, as the Tennessee Legislature did by unanimous vote in the passage of Chapter 170 of the Public Acts of 1957, three of the five members of the Tennessee Supreme Court should not be permitted to substitute their opinion for Legislative discretion, when the effect of this opinion so clearly contravenes guaranties under the United States Constitution. As stated in the Petition for

Writ of Certiorari, literally hundreds of millions of dollars are involved in this question, as well as equities involving over ninety per cent of our citizens. State Courts in seven out of nine States which have passed upon statutes almost identical to the Tennessee Statute in question here, with constitutional prohibitions against the lending of the State's credit almost identical to the Tennessee Constitutional Provision, have upheld these Acts. Not only does the effect of the Tennessee decision amount to a wholesale taking of this petitioner's property and the property of many other utilities without due process of law, but the principle involved denies the citizens of Tennessee, New Mexico and those of any other State which should adopt the minority view, their guaranty of equal rights so basic under the United States Constitution.

Respectfully submitted,

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